Ngo Chew Hong Edible Oil Pte Ltd v Geoffrey Kenneth Knight

HIGH COURT (SINGAPORE) – SUIT NO 860 OF 1983
RAJAH J
6 MAY 1988

Insurance – Shipment of goods insured – Contamination of goods during voyage – Duty of insured to mitigate his loss – Merits of case – Marine Insurance Act 1906, s 78(4)

Shipping – Insured goods contaminated during shipment – Duty of insured to mitigate his loss – Merits of case – Marine Insurance Act 1906, s 78(4)

The plaintiffs bought a shipment of soya bean oil from an American company. During the course of voyage from the US to Singapore, the shipment of oil became contaminated. The plaintiffs claimed against the defendant (who is the Lloyds representative underwriter) the full amount for the contaminated cargo less the surveyors fees and the sum of $420,000 recovered from the carrier in respect of the contaminated oil.

The defendant contended that s 78(4) of the Marine Insurance Act 1906 embodies a fundamental principle of insurance law which is that 'it is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimizing a loss' and that in this respect, the plaintiffs have not discharged their duty.

Held, dismissing the plaintiffs' claim: From the evidence adduced by the plaintiffs, the plaintiffs did little in the matter of averting or minimizing the loss while the contaminated oil was in Singapore and even less after it had left. Because the plaintiffs have not complied with s 78(4) of the Marine Insurance Act 1906, the plaintiffs must fail in their claim against the defendant.

Cases referred to

1 *Darbishire* v *Warran* [1963] 3 All ER 310 (refd)
2 *MR Currie & Co* v *The Bombay Native Insurance Co* (1869) LR 3 PC 72 (refd)
3 *British and Foreign Marine Insurance Co* v *Gaunt* [1921] All ER 447 (refd)
4 *The Gold Sky* [1972] 2 Lloyd's Rep 187 (refd)
5 *Emperor Goldmining Co Ltd* v *Switzerland General Insurance Co Ltd* [1964] 1 Lloyd's Rep 348 (refd)
6 *Integrated Container Service Inc* v *British Traders Insurance Co Ltd* [1984] 1 Lloyd's Rep 154 (refd)

Legislation referred to

Merchant Shipping Act (Cap 179, 1985 Ed) s 272(i)(b)
Merchant Shipping (Limitation of Liability) (Local Currency Equivalents) Order 1966
UK Marine Insurance Act 1906 ss 57, 60, 62, 63(i), 78(4)

Lai Siu Chiu (Miss) for the plaintiffs.
AP Godwin (HC Hiew with him) for the defendant.

Cur Adv Vult

Rajah J: The plaintiffs are a private limited liability company registered in Singapore in 1976. The nature of the plaintiffs' business is to buy edible oils, pack them and sell them to some consumers locally but mainly for export. They did not refine or process the oils.

In March 1981 the plaintiffs bought a shipment of 1,000 metric tons of fully refined soya bean oil from an American company and paid for it through the Industrial and Commercial Bank in Singapore. They arranged for insurance coverage through their insurance broker, Anthola Insurance Pte Ltd, who placed the policy with Lloyds of London in the sum of US$794,750.

The said policy, together with endorsement nos 0103/81, 0105/81 and 0106/81, is dated 16 March 1981 and signed by Alexander Howden Insurance Brokers Limited on behalf of Lloyds of London.

The said policy and endorsements provided, inter alia (para 8 of Bulk Oil Clauses SP-13C):

> 8. This insurance is also especially to cover any loss of and/or damage to the interest insured hereunder, including shortage and/or leakage and/or contamination, through the bursting of boilers, breakage of shafts or through any latent defect in the machinery, hull or appurtenances, or from faults or errors in the navigation and/or management of the vessel by the master, mariners, mates, engineers or pilots; provided, however, that this clause shall not be construed as covering loss arising out of delay, deterioration or loss of market, unless otherwise provided elsewhere in this policy.

The said refined soya bean oil was loaded on board the vessel 'Botany Triumph' into two separate tanks no 4 port and no 4 starboard at New Orleans on or about 30 March 1981 for carriage to Singapore. It is not disputed that during the course of the voyage from the United States to Singapore via Australia that a man had been drowned in tank no 4 port and that the soya bean oil in the said tank no 4 port had become contaminated by faeces and vomitus.

Before the vessel arrived in Singapore, the plaintiffs received a telex from their oil brokers on 23 May 1981 as follows:

> Botany Triumph loaded 999.819 mt fresbo a/c charts Ngo Chew Hong edible oil for disch S'pore.
>
> Whilst at Melbourne 5/16 Bosun entered tank – overcome by nitrogen and drowned in 450.21 mt cargo in 4P. Regret that two other crewmen died similarly in rescue attempt. Bodies recovered immy by port rescue authorities.
>
> All relevant authorities in Melbourne – incl health, coroner, port etc involved. Vsl sailed 5/21.
>
> In due course we will of necessity adv Singapore authorities thru P and I lawyers and ask that you in turn adv Chrtrs at same time conveying our sincere regrets for this incident.
>
> FYG – our P and I has consulted chemists who adv that cargo shud not need to be downgraded since most bacteria cannot exist in oil.

The plaintiffs did not know how serious the accident was and did not on their part do anything significant until the arrival of the vessel in Singapore on 26 June 1981.

In the meantime the Australian High Commission in Singapore informed the Singapore authorities of what had taken place on the Botany Triumph at Melbourne.

About the same time the health authorities in Singapore had confirmation of the accident from the Department of Health in Canberra. Consequent on this, Mr Chua Hong Kuan, head of the food control department, Ministry of Health, who gave evidence for the plaintiffs' wrote the following letter to Botany Bay Shipping Co (Aust) Pte Ltd of 1212, 12th Floor, International Plaza, Anson Road, Singapore, agents for the shipowners, and copied his letter at the same time to (1) the plaintiffs; to (2) Mr Tan Chin Tiang, manager of berth installation, PSA; and to (3) Mr Fong Pay Hor, berthing manager, PSA:

> Dear Sirs
>
> Re: Soya Bean Oil On Board – 'Botany Triumph'
>
> (1) We have confirmation that the above cargo has been contaminated with faeces and vomitus while enroute here from Australia.
>
> (2) The cargo should therefore not be discharged here. In the event that it is discharged it will be seized by this office under the Sale of Food Act 1973.
>
> Yours faithfully
>
> Sgd:
>
> Chia Hong Kuan
> for Director of Food Administration

Subsequent to this as a result of further representations to the MOE by the plaintiffs and other interested parties the soya bean oil in tank no 4 starboard was allowed by MOE to be discharged for human consumption for the reason that the two tanks were entirely separate one from the other and that the drowning had taken place in no 4 port tank and not in no 4 starboard tank. Tank no 4 port was therefore sealed by the MOE and the contents thereof not permitted to be discharged. The uncontaminated soya bean oil in no 4 starboard, about 524 mt, was discharged into a shore tank. According to Cheo (PW1) 'the ship left Singapore on the following or next day without no 4 (port) being discharged'.

Cross-examined by counsel for the defendant, PW1 said 'I felt that I had done my best and that I could not control the movement of the vessel. MOE refused to allow the discharge of oil from no 4 (port) tank. The insurance brokers and insurers were informed of this. The plaintiffs took legal advice on this matter.'

The evidence of Andrew Cheo (PW2), another director of the plaintiff company, was 'We went to MOE to secure release of cargo. We asked for 100% release. Mr Chia said there was no way to do this as a person had died in the oil. We suggested refinement but the MOE did not agree as this would not erase the contaminants, ie be free of bacteria. Then we tried to persuade Mr Chia that the oil be released for industrial use. This was also refused. MOE finally agreed to release no 4 tank (starboard) oil after we produced the structure of the ship on condition that his men have to be there to see the discharge and no 4 (portside) tank be sealed.'

As against the evidence of the two brothers, Mr Chia Hong Kuan, the ministry official, who was called by the plaintiffs, said: 'Vomitus and faeces will not be picked up on analysis. There was talk of whether the oil could be used as industrial oil. We did agree that it could be used for industrial oil. From the point of view of my department we would have allowed the oil to be discharged.'

Again under cross-examination, he said 'we would have discussed with the plaintiffs what could be done with the contaminated oil. Basic aim is protection of public health. I approved in principle its use for industrial purpose. PW2 Andrew Cheo – Not true that I refused him release for industrial purpose.'

There is no positive evidence as to what has happened to the contaminated oil, but it could be that from DB55A, a telex dated 10 September 1981 from Steamship Mutual P&I Club, which reads:

> We refer above matter in which you assisted Caleb Brett regarding ownership of cargo. Consignee's through their solicitors, Allen and Gledhill, have now given notice of a claim for shortage of 542.05 mt.
>
> Caleb Brett calculate this at approx USD 702,897.91. Claimants solicitors enquire whether carrier will admit liability and when they can expect settlement. Failing a reply they will commence proceedings to arrest vessel. In order to avoid this action please discuss with Caleb Brett and then contact Allen and Gledhill to obtain details of claim. Their ref is LSC/SN/1406/81 Nicheo. For yr information only we are informed that cargo abandoned by cargo owner and in order to mitigate loss vessel owner arranged sale in Sydney and final proceeds of USD 280,834 placed on deposit pending outcome of claim. We are forwarding on to you copy of tanker voyage charter party between Botany Bay and Ngo Chew Hong Edible Oil Private Ltd to enable you to advise re possible defence under charter.

One could reasonably surmise that the contaminated oil had been sold in Australia and the proceeds of sale are lying somewhere in Australia pending the outcome of this claim.

On 2 February 1982 (PB72), the plaintiffs executed a claim release to Botany Bay Shipping Co (Aust) Pty Ltd, the carrier, in the following terms:

> We acknowledge receipt of the sum of S$420,000 paid to us without prejudice in full and final settlement of our claim against you in the above matter and in consideration thereof we hereby formally release you from all claims, liabilities and responsibilities whatsoever and howsoever arising out of or in respect of the above-captioned cargo.

In para 5 of the statement of claim the plaintiff states that:

> As a result of the said contamination the cargo in no 4 port was of no value to the plaintiffs and the director of food administration in Singapore did not permit it to be discharged in Singapore.

and contends in para 6 thereof that:

> In the premises the defendant is liable to indemnify the plaintiffs in respect of the loss of the said cargo by contamination pursuant to the terms of endorsement 0103/81 (AD05) to the said policy.

The relevant part of the said endorsement reads:

> Conditions of Insurance: Bulk Oil Clause SP 13C including leakage and shortage excess 0.5% whole shipment. Including contamination irrespective of percentage, institute war, strikes, riots, civil commotion clauses.

On this basis the plaintiffs claim the full amount for the contaminated cargo less the surveyors fees and the sum of S$420,000 recovered from the carrier in respect of the contaminated cargo. In other words the plaintiffs' claim against the defendant is as for a total loss plus surveyors fees less the sum of S$420,000 recovered from the carriers in respect of the contaminated oil. As for the defendant he counterclaimed against the plaintiffs for damages on the basis that contrary to the plaintiffs' obligations under the said marine cargo policy, they failed to preserve the defendant's rights against the owners of the vessel 'Botany Triumph' by taking any action against 'Botany Triumph' or her owners thereby causing prejudice to the defendant. However, at the trial the defendant did not pursue his counterclaim.

The defendant contends that s 78(4) of the Marine Insurance Act 1906 embodies a fundamental principle of insurance law which is that 'it is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimizing a loss.' Section 78(4) applies to policies containing a sue and labour clause as the policy in the instant case does.

Counsel for the defendant submitted the following cases supporting the well-accepted principle that the insured is under a duty to mitigate his loss and 'act as if uninsured': *Darbishire* v *Warran*;[1] *MR Currie & Co* v *The Bombay Native Insurance Co*;[2] *British and Foreign Marine Insurance Co* v *Gaunt*;[3] *The Gold Sky*;[4] *Emperor Goldmining Company Ltd* v *Switzerland General Ins Co Ltd*;[5] *Integrated Container Service Inc* v *British Traders Insurance Co Ltd*.[6]

In *MR Currie* v *The Bombay Native Insurance Co*[2] a suit was brought to recover moneys under two policies upon the cargo and disbursements of a vessel, both policies being for a total loss. With regard to the cargo policy, the master did not take any reasonable steps to save or discharge the cargo and gave notice of abandonment. A large part of the cargo was afterwards saved.

The Court of Appeal held, affirming the court below, that as the cargo might have been and was, in fact, partially saved, there was no such total loss of the cargo and freight as entitled the assured to recover on either of the policies.

In the Australian case of *Emperor Goldmining* v *Switzerland General Ins Co Ltd* [5] it was held, under their equivalent of s 78(4), that the duty to sue and labour imposed on the assured was to take such measures as were reasonable to avert or minimize a loss.

Integrated Container v *British Trader Ins Co*[6] was a case where the plaintiffs had insured some containers and the containers were leased and subsequently lost and the plaintiffs had made attempts to recover the containers. It was held by the Court of Appeal that the duty under s 78 was 'to take such measures as may be reasonable for the purpose of averting or minimizing loss' and those words imposed a duty to act in circumstances where a reasonable man intent upon preserving his property would act.

The plaintiffs contend that in taking steps to claim from the shipowner and in recovering from the shipowner a sum of S$420,000 based on the limitation of liability allowed to the shipowner under s 272(i)(b) of the Merchant Shipping Act (Cap 179, 1985 Ed) read with the then Merchant Shipping (Limitation of Liability) (Local Currency Equivalents) Order 1966, the plaintiffs have discharged their duty. This contention of the plaintiffs that in so doing they have wholly discharged their duty of averting or minimizing loss I cannot accept. From the evidence adduced by the plaintiffs it seems to me that the plaintiffs did little in the matter of averting or minimizing the loss while the contaminated oil was in Singapore and even less after it had left. The two directors of the plaintiffs say that the authorities in Singapore did not allow them to land the contaminated oil in Singapore. But the evidence of Mr Chia, a highly placed official in the MOE, is quite explicit that in so far as the MOE was concerned they had no objection to the landing of the contaminated oil in Singapore so long as it was not for human consumption but only for industrial use.

I accept the evidence of Mr Chia on this matter. I was impressed by him as a witness of truth. He has no axe to grind in this matter and he is an impartial and independent witness. It could well be that the plaintiffs, having been insured for the full value of the cargo, were under the mistaken impression that if the contaminated cargo was allowed to sail away from Singapore they could get the full value for the contaminated oil from the insurers. It never occurred to them nor was it brought to their notice, it would appear, that they could have had the contaminated oil stored in Singapore and then have looked around for a suitable purchaser or purchasers in Australasia, South-East Asia or in Asia. They must have thought 'Why go to the trouble and bother of looking for a suitable buyer when we can get the insurance company to pay on a total loss basis.' And the plaintiffs could have arrested the ship or obtained an injunction against the carrier if they had refused to have the goods landed in Singapore. On this score of not complying with s 78(4) of the Marine Insurance Act alone the plaintiffs must fail in their claim against the defendant.

On the question of whether there was a total loss it is abundantly clear from the evidence that the plaintiffs concede that the contaminated oil had commercial value but go on to say that so far as they are concerned the oil had no value as they were only in the business of packing and selling soya bean oil. The question here is not whether the contaminated oil was of value to the plaintiffs but whether it had a commercial value, which it obviously and admittedly had for industrial use.

On the question of whether notice of abandonment was effectively given, s 62 of the Marine Insurance Act is the relevant section and it provides:

(1) Where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.

(2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

(3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(6) Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(8) Notice of abandonment may be waived by the insurer.

(9) Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

Actual total loss and constructive total loss are defined in ss 57 and 60 of the Marine Insurance Act respectively:

57(1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual total loss no notice of abandonment need be given.

...

60(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss –

(i) where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) ...

(iii) in the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

Thus, in the case of a constructive total loss, notice of abandonment must be given before the insured can claim as for a total loss. Under s 63(i) of the Marine Insurance Act where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.

Counsel for the defendant submitted that before a notice of abandonment can be given there must be:

(a) a constructive total loss, which for present purposes means that the contaminated cargo could not be re-refined and shipped at a cost less than its value after such re-refinement, (which is clearly absurd); and

(b) an insured interest capable of passing to the insurer from the insured, upon which the notice of abandonment could take effect.

In this case, the evidence is that the plaintiffs had abandoned the insured goods to the shipowner on or before 7 July 1981. Having already abandoned their interest in the cargo to the shipowners on 7 July 1981 there was nothing for them to abandon to the underwriters by their purported notice of 8 July 1981 to Alexander Howden who, to make matters worse for the plaintiffs, were not, in my view the underwriters' agents to receive such notice. Clearly in this case, no proper notice of abandonment was given to the insurers or their agents duly authorized to receive it.

In the circumstances the claim of the plaintiffs is dismissed with costs.

Claim dismissed.

Solicitors: *Allen & Gledhill; Godwin & Co.*

Reported by *Ng Sheau Jiuan*